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COMPETENCY OF ATTESTING WITNESSES TO WILLS, AND EFFECT OF INTEREST UNDER WILL AS DISQUALIFICATION.

Several interesting questions on the above points have arisen under the case presented by the following statement of facts.

R. was a man with an estate of nearly $100,000.00. He died and left a paper writing purporting to be his last will and testament, bearing his signature and the signatures of two others as attesting witnesses. Two lawyers, brothers and partners in the practice of law, were the only persons present with deceased when the will was prepared, and one of them, A, was made executorial trustee, with full discretionary powers for sale and reinvestment of the corpus in loans on real estate security, for a period of fifteen years, on a 5% commission basis of compensation to the trustee-executor. B, the other partner, was one of the attesting witnesses, and C, a third person, was the other. It was an admitted fact that the compensation received by A as executorial trustee would go to the firm of A and B, and be shared by B.

The writing was admitted to probate, ex parte, a few days after deceased's death, before the clerk, and an appeal therefrom by the widow and heirs-at-law perfected to the Circuit Court. On this appeal an issue d. v. n. was made up and tried before a jury, and a verdict sustaining the will rendered. A motion to set aside the verdict was overruled, as also was a motion to set aside the probate of the will.

On this trial the following cognate propositions of law were advanced by the contestants of the alleged will:

(a) An executor in trust is disqualified to testify in a will contest where he is a party and proponent although not an attesting witness, unless he gives security for costs;

(b) An executor in trust to whom the estate is devised and bequeathed, and who is named in a will which is attested by a witness who shares with him the commissions and profits of the trust, takes such a beneficial interest in the estate as was voided by Sec. 2529 of the Code of Virginia (1887).

(c) Where one of two attesting witnesses to a will shares the profits of the trustee named in the instrument, and to whom the estate is devised and bequeathed, he has such "beneficial interest" in the subject matter as disqualifies him as a subscribing witness, and the will is void.

[Note. Proposition (a) is no longer true, since the Code of 1919, and discussion of that will be omitted. As Sec. 2529 of the Code of 1887 was repealed by the Code of 1919, proposition (b) is unimportant now, except that, as we will indicate below, cases may arise as to which it may be it would have been better to retain § 2529. Therefore we will take up the last, to-wit: (c), first, and then (b), second.]

FIRST:

Where one of two attesting witnesses to a will shares the profits of the trustee named in the instrument, and to whom the estate is devised and bequeathed, he has such "beneficial interest" in the subject matter as disqualifies him as a subscribing witness, and the will is void.

[Note. Although many changes were made by the 1919 Code in the statute law discussed by this article, still a will must be attested by witnesses "competent" at the time of attestation, and it may well be doubtful if a change in the rule of competency would retroactively validate an attestation invalid when made. Therefore this discussion of proposition (c) may be very pertinent still.]

The competency of witnesses to wills is of two kinds:

1st. Competency to subscribe or attest the will.
2nd. Competency to testify on an issue assailing it.

(a) Competency of the first class is a matter of substantive law:

This is regulated and controlled by statute and the existing common law. E. g., any person taking a beneficial "interest" under the will cannot attest it. Such person is not "competent" at common law or by statute. The reason is they are "interested" and may take advantage of the testator.

(b) Competency of the second class is referred to the rules of Evidence:

A person might be incompetent as an attesting witness but competent as an evidentiary witness on an issue d. v. n.: E. g., a devisee, or legatee, is not competent to *attest* at common law, or under the statute, because he is interested in the execution of the will; but by statute in most of the states, he is now made competent (by an avoidance of this interest) to be either an evidentiary witness or an attesting witness. If there are two competent attesting witnesses, exclusive of himself, the execution is valid, otherwise it is void. Bruce *v.* Shuler, 108 Va. 670.

Competency of the first class is thus stated by I. Wigmore on Ev. 582:

"Whether the person attesting a will is eligible as such is purely a question of the substantive law applicable to the validity of wills. The object of the statute is not to determine the competency of the person called to testify to the will, but to secure the execution of the will under formalities of a specified sort. The will is required to be in writing, to be signed by certain persons, and to be signed in the presence of certain persons; if these rules are followed, the will is valid in form and no one of the rules is more a rule of evidence than another."

Sec. 3345 of the Code of 1887 operated to remove the bar of incompetency in general legal proceedings, of persons in interest and also parties to all civil proceedings. But the next section of the same chapter on Evidence excepted from the operation of the enabling act attesting witnesses to wills, deeds and other instruments.

Sec. 3346. *Qualifications of preceding section.*

The preceding section is subject to the following qualifications:

First, of Husband and Wife, and Witnesses to Deeds and Wills.

"The competency of husband and wife as witnesses for and against each other during the coverture or after its termination, and the competency of attesting witnesses to wills,

deeds and other instruments, shall be determined by the law in force the day before this Code takes effect."

The subsequent enactments, made in 1893-4, p. 722; 1897-8, p. 753; 1901-2, p. 798, enlarged the privileges of husband and wife as witnesses in both civil and criminal cases; but the competency of attesting witnesses to wills, deeds, and other instruments remained as formerly. 2 Minor (3rd Ed.) 1014, 1015.

Among the "several classes of witnesses to wills whose competency may come into question," Prof. Minor enumerates "an executor who is an Attesting Witness to the Will." He makes this enumeration over the citation of the Statute indicated (Sec. 2531, Code 1887) and the case of Coalter *v.* Bryan, 18 Gratt. 1, at p. 87, 94, and of Martz *v.* Martz, 25 Gratt. 363; thus indicating that their competency is not affected by the Statute or by those cases, as in neither case was the executor an attesting witness; and in Coalter *v.* Bryan he was not even a party to the probate and did not propound the will.

Section 2531 of the Code of 1887 (retained as § 5245 of 1919 Code) is as follows:

"No person shall, on account of his being an executor of a will, be incompetent as a witness *for or against the will:*" i. e., on an issue d. v. n. This Statute has no reference to an attesting executor. The language of this Statute, which was enacted because of the doubt raised on the probate of the Randolph will in Coalter *v.* Bryan, supra, (decided in May, 1844) confines the competency to questions of validity which might be raised on an issue involving sanity, undue influence and the like; and this appears more strikingly when contrasted with the language of the Statute next preceding as to competency of creditors. These are made competent even *to attest* the will, when the estate devised is charged with the payment of their debts. Vide 4 Minor's Ins. (3 Ed.) 108, 109, where the distinction is drawn in the text.

Section 2530 of Code of 1887 (retained as § 5244 of 1919 Code) is:

"If a will charging an estate with debts *be attested* by a creditor. . . . . Such creditor shall, notwithstanding, be admitted a witness *for or against the will.*"

Both of these Statutes are first found in the Code of 1849, and are taken in part from the English Statute 1 Vict. ch. 26, which went into effect July 3, 1837. But the Virginia Statute materially restricted the competency of an executor, as compared with the English Statute Sec. 17, which is as follows:

> "XVII. And be it further enacted that no person shall, on account of his being an executor of a will, be incompetent to be admitted as a witness to prove the *execution* of such will, or a witness to prove the *validity* or *invalidity* thereof."

This English Statute recognizes the distinction between the two classes of witnesses required to prove (a) the execution; and (b) the validity or invalidity of a will; and makes the executor competent to do either. On the other hand, the Virginia Statute confines the executor's competency to testimony "for or against the will," as contradistinguished from competency to prove its statutory execution.

Section XVI of the English Statute, to which Sec. 2530 of the Code 1887 corresponds, is likewise more comprehensive than the Virginia Statute in the same particular as that relating to executors. It reads:

> "XVI. And be it further enacted that in case by any will any real or personal estate shall be charged with any debt or debts, and any creditors, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the *execution* of such will, or to prove the *validity* or *invalidity* thereof."

The legislative intent to make no change in the rule of competency required of attesting witnesses was conclusively demonstrated by the action of the General Assembly on the report of the revisors of the Code of 1849. The revisors, as appears from notes appended to their report, page 628 (Report of Revisors, 1840) considered the question under discussion. They advised a relaxation of the rule which rendered incompetent attesting witnesses, to the extent of admitting them, in cases in which it was made to appear that their interest was waived or had otherwise disappeared. They proposed this Statute: "Sec. 18, The objection that a person who attested the execution of a will was

at the time of such execution an incompetent witness shall not be valid if at the time of proving the will he be competent." But the General Assembly declined to relax the old rule and struck out the section quoted, thus plainly adhering to previous adjudications of the law. When the revisors of the Code of 1887 made their report, they also adhered to the old rule and the legislative intent as indicated by the exceptive clause in Sec. 3346 of the 1887 Code. The revisors of the Code of 1919 were silent on this point, and left these two sections as they were. Until the enabling legislation, executors and other personal representatives were incompetent witnesses when parties to actions and suits, and it became necessary to pass the statute later codified as Sec. 2531 of the Code of 1887 to qualify executors as witnesses even in cases involving the contests of wills. The very negativeness of the form of the statute discloses the necessity for its enactment.

But this statute, as heretofore indicated, merely qualifies executors to testify "for or against a will" and does not qualify them to attest it. It was apparently designed to meet the situation confronting Judge Leigh in the John Randolph will contest, upon whose competency to testify on the trial as to the sanity of the testator, so much doubt was thrown. He was not an attesting witness. He was not even a party to the probate, neither insisting upon nor contesting the validity of the execution of the will. He was merely an executor in a prior will which had been probated. Even so, his competency to testify on the hearing merely as to testamentary capacity was challenged by the ablest lawyers of that day in Virginia and his competency was so much doubted, that the statute in reference was passed. That it was confined to just this particular purpose is apparent from a consideration of its terms themselves, and, more strikingly by a comparison of it with the language employed in the next preceding section respecting creditors. It was pointed out by Judge Keith in the case of Bruce *v.* Shuler, 108 Va., at page 677, Creditors are made competent *attesting* witnesses in so many words. Executors are made competent merely to testify *for or against the will,* but not to attest it. Their incompetency to attest remains as before (Sec. 2531, Code, 1887).

If the revisors of the Code of 1887, who were very learned lawyers, had not recognized the then existing difference between the competency of an executor to testify "for or against the will," under Sec. 2531, and that of an attesting witness to a will under Sec. 2414, why did they deem is necessary to insert the exceptive clause in Sec. 3346? Mr. Minor notes it by calling attention to the classes of cases which may arise in the attestation of wills; and Judge Keith in Bruce *v.* Shuler, 108 Va., at page 677, notes it in concluding his opinion.

In the Code of 1849, p. 663, as already pointed out, it is provided that "No trustee, executor or other fiduciary, shall be incompetent as a witness in any case by reason only of his being a party thereto, or of his being liable to costs in respect thereof; but if liable to costs, he shall not be competent *unless some person undertake to pay the same.*" This statute was embraced in the compilations of 1860 and 1873 by Mr. Munford, and was the law in force on the day before the Code of 1887 went into effect; (Code Sec. 3346).

In order to remove non-attesting executors from its influence, it was deemed necessary to enact the special statute (Sec. 2531), which still stands as § 5245, Code 1919.

In Riddell *v.* Johnson, 26 Gratt. 152 this rule is shown as it existed before the enabling act.

The distinction between an executor who is an attesting witness and one who is not so, is specifically pointed out by Judge Anderson in Martz *v.* Martz, 25 Gratt. 346 (decided in September 1874). There the executor was received as a witness to sustain the will on the contest upon the very ground that he was not an *attesting* witness.

Competency of Attesting Witnesses Who Are Executors in Trust.

In the case of Coalter *v.* Bryan, 1 Gratt. at p. 93 (May 1844), Judge Baldwin points out the difference between the decisions holding an executor in trust (who is not an attesting witness) competent to testify on the issue *devisavit vel non,* when the contest is between the estate he represents and others claiming adversely thereto; and (2) in contests between persons claiming not adversely to the estate, but having conflicting interests there-

in; and (3) between those cases, and one in which the *cestuis que trust* call the executor to account.

In that case the executor in trust (Judge Wm. Leigh) was not an attesting witness, nor was he a party. He refused to propound the will for probate or to take part in the proceedings.

As Section 3346, Code 1887, retained the bar as to attesting witnesses, the executor in trust A. was excluded (whatever his position), as a party to the proceedings. As he was here a propounder and, in addition, takes a beneficial interest, he was thereby doubly barred. Bruce *v.* Shuler, 108 Va. 670, *infra.*

That Statute (Sec. 3346) declared that the rule of law of attesting witnesses should remain as it was on the day before the Code of 1887 went into effect. Under it persons taking "*any* beneficial interest" are incompetent unless the will cannot "be otherwise proved;" i. e. by two competent witnesses other than the attesting beneficial witness. Bruce *v.* Shuler, 108 Va. 670, *infra.*

The policy of the law is sound as requiring a proper safeguard to testamentary dispositions. Its purpose is benign as removing temptation from the minds of those most exposed to its influence. The books have many cases in which lawyers have refused to accept the executorship of wills they were called upon to attest; and, conversely who have declined to attest wills they were nominated to execute.

Besides the American cases, *infra,* the question was before the English Chancery in the Court of Appeals in recent years, since the Statute of 1 Vict., ch. 26, Secs. 15, 17, and these will be noticed more in detail presently. They hold in accordance with the contestants' contention here.

The principle contended for was decided by the Supreme Court of Appeals of Virginia in the case of Bruce *v.* Shuler, 108 Va. 670. That case, like this, turns on the proper construction of Sec. 2514 and Sec. 2529, Code of 1887, and will be presently discussed fully.

Section 2514 provides (now § 5229, Code 1919, substantially unchanged):

> "No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by

his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly written by the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

Section 2529 (omitted from Code 1919) provides:

"If a will be attested by a person to whom, or to whose wife or husband any beneficial interest in any estate is thereby devised or bequeathed, if the will may not be otherwise proved, such person shall be deemed a competent witness, but such devise or bequest shall be void. * * *"

As the last Statute originally stood, the words "or to whose wife or husband" did not appear. The amended Statute, Code 1849, p. 519, Sec. 19, enlarges the terms to that extent. But an important enlargement of the disqualification of attesting witnesses was the substitution of the words "any beneficial interest," for the former words "any bequest." Even before the change, so jealous was this Court in safeguarding a testator by disqualifying attesting witnesses because of interest, it was held that "any bequest" was broad enough to include an interest in lands. Croft *v.* Croft, 4 Gratt. 103.

So that in the former state of the law, the competency of an attesting witness in Sec. 2514 was to be measured by the words of disqualification found in Sec. 2529. If the attesting witness takes *"any* beneficial interest" "in any estate" *under the will,* while he is made competent by the avoidance of that interest to prove the execution, still the full statutory requirements of Sec. 2514 must be met; i. e. the will must have been attested by two competent witnesses, *competent at the time of attestation.* If these requisites are wanting, the will is void. This Statute, to the extent indicated, is merely declaratory of the common law. The saving clause which follows, and which relaxes the rigor of the rule in certain cases, indicates the reason for the change. It is this: As frequent injustice resulted to innocent objects of a testator's bounty by declaring the whole testament void, it was deemed a sufficient safeguard to the protection of the testator's estate to declare void only so much of the testament as gave a

beneficial interest to the witness subscribing. Therefore it may well be unfortunate that Sec. 2429 was omitted entirely.

This point is fully discussed by Judge Keith in Bruce *v.* Shuler, 108 Va. 670 (a case elaborately annotated and approved in 35 L. R. A. (N. S.) and it is decided as herein contended.

Judge Keith says:

In Shuler (sic) on Wills (3rd Ed.), Sec. 353, it is said:

> *"The disqualification of interest is that which courts have chiefly to consider where the competency of a subscribing witness is drawn in question.* One who has an immediate beneficial interest in a will is at the common law disqualified from becoming a subscribing witness thereto. He is neither 'competent' nor 'credible,' in the sense of the Statute, and *the test of competency is the state of facts when the will is made, and not when it comes into operation.* It is proper to observe that our statute which has made so many and such radical changes with respect to the competency of witnesses does not affect the competency of attesting witnesses to wills, deeds, and other instruments. Code Sec. 3346.
>
> "The object of the statute was to prevent frauds as well as perjuries. Wills are frequently made by a testator *in extremis,* or when he is greatly debilitated by age or infirmity, when fraud may be practiced upon him with facility by the crafty and designing; and it was the intention of the Statute to guard against such practice, and protect the testator by surrounding him with *disinterested* witnesses at the critical and important moment when he is about to execute his will. They are to be *disinterested* and *credible,* also, at the time of attestation, because in some sense they are made the judges of the testator's sanity. It is their duty to inquire into this matter, and if they think the testator not capable, they should remonstrate and refuse their attestation."

That the new Code has not entirely discarded the disqualification of interest, is shown by its still requiring a holographic will be proved by "at least two *disinterested* witnesses." See last clause (new) of Sec. 5229.

The conclusion reached was that, notwithstanding the provisions of Sec. 2529 of our Code, which says:

> "If a will be attested by a person to whom, or to whose wife or husband *any beneficial* interest in any estate is thereby devised or bequeathed, if the will may not otherwise be proved, such person shall be deemed a competent witness."

A will subscribed by two witnesses, one of whom is incompetent by reason of interest, is void, because the other witness cannot prove that the instrument was attested as the Statute (Sec. 2514) requires. Says the opinion:

> "In our judgment the true view of the Statute is that the words, 'if the will may not otherwise be proved' has reference to a case where the devisee or legatee is needed as an attesting witness to *make up the number required by law,* in which he is made a competent witness by the avoidance of his interest, and he may be also called to testify at the probate of the will."

This ruling is in accord with the courts of other jurisdictions. These cases in part follow. It will be observed that Judge Keith draws the distinction between the competency of a witness to prove the execution of the will and one qualified to testify on the final probate on an issue made for the purpose.

The Supreme Court of Illinois, in Smith *v.* Goodell, 101 N. E. 255, 258, Ill. 145 (decided February 20, 1913, and a rehearing denied April 2, 1913) disposed of the precise question upon a state of facts strikingly agreeable to that presented here.

Butzow wrote the will of Smith, and was one of the two attesting witnesses. Butzow's business partners were named in the instrument as executors in trust, and it was shown that their commissions would be shared with Butzow. A jury, on an issue, found a verdict sustaining its validity, but the will was held void by the appellate court for illegal attestation and the lower court was reversed.

The opinion notes the distinction, to be borne carefully in mind, between the case of an attestant who is an executor and acquires *ex vi termini* the forbidden "beneficial interest," and the case of an attestant who has a "beneficial interest" in fact, but not in appearance. In the one case, the disqualification is *prima facie* the instrument itself; in the other case the disqualification is *de hors* the instrument. For example, the attesting witnesses in the second case may have a secret understanding with an executor to share commissions; or with a devisee to share an estate in land; or an attestant might be a creditor of the testator, before the common law rule of disqualification in such case was changed

in Virginia by statute; or—before the time of the enabling statute—an attestant might be a spouse of a beneficiary. All such witnesses would have the forbidden "beneficial interest" denounced by statute, but it would not be patent. It would exist not by the terms of the instrument, but independently of it. Yet, on the trial of an issue, as soon as this "beneficial interest" did come into the case and was satisfactorily established, the disqualification would be absolute. And its effect would be more far reaching than in those cases where the disqualification for interest appears on the face of the instrument, because there is no provision in the statute (except as to creditors and spouses), for making such witnesses competent by avoidance of interest. The disqualification arises outside of the instrument and is within the bar of the common law; whereas the statute modifying the common law applies only to cases of disqualification arising by the terms of the instrument itself.

The Court affirmed that it was "committed to the view that one is not a competent witness to the execution of a will which names him as executor." (Distinguishing Jones *v.* Greiser, 87 N. E. 295).

As the will under consideration is attested by two witnesses only, one of whom is shown and substantially admitted to be incompetent, it is not executed as the law requires. And as the statute does not remove the bar of incompetency in a case where the disqualification arises *de hors* the instrument, it follows the will is void and the motion to set aside the order of probate should have prevailed; and the motion to set aside the verdict of the jury as being contrary to the law and the evidence should also have prevailed for the same reason.

There is no difference in principle between the decision in the Illinois case just cited and that of Bruce *v.* Shuler, *supra.* Bruce wrote the will and attested it with another. He was appointed by the will as Executor and also took a beneficial interest under its provisions. As the will could not be proved as having been attested by the two competent (credible) witnesses required by the statute, it was a void instrument, and this court so held.

The facts here are, that the will of R. was produced before the Clerk in the Clerk's office and "proved by the oaths of B

and C the subscribing witnesses thereto and ordered to be recorded." On the appeal to the Circuit Court, as soon as it became apparent from the evidence that B, one of the subscribing witnesses, was a partner with the executor in trust to whom the entire estate is devised and bequeathed by the very terms of the testament for fifteen years, and participated in the profits, it was plain that the will had therefore been not legally attested by two disinterested, credible, witnesses, and had been unlawfully admitted to probate. As already stated, the motion to annul and set aside the order of probate should have prevailed under the authority of Bruce *v.* Shuler, *supra.* See also, Fearn *v.* Posttewaite (Ill.), 88 N. E. 1057.

The case of Crowell *v.* Tuttle, 105 N. E. 980, was before the Supreme Court of Massachusetts, in 1914.

Ellis signed as an attesting witness. The will contained a bequest of funds to a church for the purpose of retiring a promissory note on which Ellis' name appeared as one of several guarantors. He was held incompetent on the ground of interest. See also, In re Palethorp's Estate (Pa.), 94 Atl. 1061, holding that an attesting witness who was a stockholder in a trust company named in the will as executor in trust, was incompetent.

Executors in Trust: Dual Capacity.

In the case of Jones *v.* Broadbent, 123 P. 496 (Idaho 1912), there is pointed out, in a full argument, the dual capacity of persons who are appointed executors and trustees and the distinction between the two offices. The testator left the widow that portion only of his estate to which she was entitled by law. The third clause devised and bequeathed the remainder of his estate to be divided into four equal parts, three of which he gave outright to three of his children and the fourth part he placed in trust with his two executors for the benefit of a fourth son. The executors made a contract of sale for part of the property and the purchasers refusing to perform, a deed was tendered and a suit for specific performance instituted. The refusal to perform was grounded on the objection that the executors could not sell the lot in contract and give title thereto.

The opinion says:

"It appears from the provisions of said will and the record before us that plaintiffs have two offices imposed upon them by said will, namely that of executors of said will, and that of trustees; and the question directly raised is at what period of time do they cease to act as executors and their duties as trustees begin.

* * *

"The duties of plaintiffs are separate, distinct and independent of each other; and until the executors are discharged, and they assume the duties of trustees, their powers and duties as executors continue. (Citing Cases). Of course, if during the administration, a partial distribution is made, the executor should be discharged as to such part and could then act as trustee.

* * *

"Before distribution, they held possession of all property of said estate as executors not as trustees, and they as trustees would have no authority to intermeddle or interfere with the due administration of said estate, until such administration had been completed, and until they had been discharged as executors, or until a partial distribution had been made.

"When the same person has been appointed by will to perform some dual duty, such as executor and trustee, in respect to the property of the estate, no service is demanded of him as trustee until he had performed his executorial obligations and distribution is made. In re Roach's Est. 92 P. 118, Oregon."

The court then decreed that as far as it was necessary to pay the debts of the estate the power of sale was in the executors, and deemed that as far as it need go in the matter.

The Supreme Court of New Jersey, in Snedeker *v.* Allen, 1 N. J. L. 35, says on the point:

"It appears on the face of the instrument in question that two witnesses were called; the surrogate, as it seems, aware that the evidence of the subscribing witness Peter Johnston, was not sufficient, admitted Ort Vanpelt, one of the executors to prove that this will was executed in due form of law. And the question now arises, can an executor be a competent witness to prove a will. It is contended by the counsel for the defendant that he can; a number of cases

have been cited in support of this opinion, and the noted one of Lowe *v.* Jolliffe much relied on. But it must be remembered that Dovey, the executor of Jolliffe released a legacy of 200 pounds which he was to receive as compensation for his services before he was admitted as an evidence; had Ort Vanpelt released his claim to all compensation for his services as an executor, I think he would have stood on equal ground with Dovey. As it does not appear that this was done, under the *general principle that he who is interested in or receives a benefit from a will* shall not be permitted to prove it, I am of the opinion that Ort Vanpelt was not a credible witness within the meaning of the law."

In Tucker *v.* Tucker, 5 Iredell (27 N. C.) 272 the court held that:

"One who is named as executor in a will, is so far interested by reason of the commissions to which he is by law entitled, as to render him an incompetent attesting witness, as regards the disposition of the personal property."

And the will was declared void as a will of personalty.

It was held good as to the realty devised upon the specific ground that the will did not give the executors a commission upon the sale, as was done in Allison *v.* Allison, 4 Hawes 141. Nor did the law give it to them. The statute confined commissions to personalty. If the will had given compensation, or had the law done so, it is clear the decision would have been the same as to both questions, as appears below. See also, Morton *v.* Morton, 11 Iredell (N. C.) 368; Gunter *v.* Gunter, 3 Jones 441 (48 N. C.); Tucker *v.* Tucker, 5 Ire. 161; Morton *v.* Ingram, 11 Ire. 368; Huie *v.* McConnell, 2 Jones 455; Allison *v.* Allison, 4 Hawks 141. In North Carolina an executor is now made competent to prove the execution of the will in which he is appointed, or to prove the validity thereof. R. C. of North Carolina, ch. 119, Sec. 9. But this will was executed, the testatrix died, and an issue devisavit vel non was made up, all before the Revised Code went into operation.

It will be observed that a special act was necessary in that state to make an attesting executor competent as a witness to the execution; but the common law rule remained in Virginia up to Jan. 1, 1920.

The Supreme Court of Texas, in a case decided in 1881, passed squarely on the point in a case involving the probate of a nuncupative will. Suit was brought to prove the will which purported to devise a lot in the city of Austin and provided that John M. Holland, as executor, should take possession of the remainder of testator's property and pay his debts. The case is Watts *v.* Holland, 56 Texas 54. It was opposed on the probate by a sister of the decedent and her husband.

On the trial, the executor was received as a witness and this was held error and the case reversed. The incompetency of the executor as a witness to establish the will was placed on the common law rule; the executor received no other interest in the estate save the statutory commissions.

The right to make nuncupative wills is preserved by statute in Virginia. Sec. 2615, Code of 1887. In Taylor *v.* Taylor, 1 Rich. 531, the Supreme Court of South Carolina held an executor to be an incompetent attesting witness to a will, under the statute of that statute corresponding to ours, upon the ground of interest. The same court in Vinyard *v.* Brown, 4 McCord 24, held that an executor was incompetent upon the ground of interest.

In the case of In re Stinson's Estate (Penn. 1911) the disqualifying character of the "interest" is passed upon. It is reported in 81 At. 207. Here the testatrix devoted nearly the whole of her estate to the establishment of a charity to be used as a Woman's Christian Association. The institution was not in existence but was created by the terms of her will. Therein, in precatory words, she nominated, among others, one of the two attesting witnesses to be members of the executive committee of the institution. The court below held that the interest which the attesting witness had in the estate devised disqualified her as an attesting witness under the Pennsylvania statute requiring wills to be attested by two "disinterested" witnesses. This was affirmed on appeal, and the will declared void. See also, Kessler's Est., 70 At. 770.

The Pennsylvania statute does not require the "attesting" or "proving" witness to subscribe the instrument as is required in Virginia, though the two words are frequently used interchangeably. Cf. the Virginia statute (1887), Sec. 2514. The act of

Pennsylvania 1855 substitutes the word "attest" for the word "prove," which change of terms would seem to require a subscription. Cf. Combs Appeal (1884), 105 Penn. At. 161. But as to the character of witnesses the Pennsylvania and Virginia statutes are identical—that is, they must be "competent."

In Hogan *v.* Hinchey, 94 S. W. 522, the Supreme Court of Missouri (1906) held that under the express provisions of its statute (Rev. St. 1899, Sec. 4637) one named as executor is not incompetent to testify as a witness *in a suit contesting the will* (Note. He is also made competent "for or against the will" by statute in Virginia), but approved in positive terms the point made by contestants in the pending case, and refused to say that an executor in trust is a competent witness, *even in a contest.* That an executor in trust with power of sale, or to collect money and apply it receives a "substantial interest" under a will seems to be the opinion of the court.

Durant *v.* Starr, 11 Mass. 527, was an appeal from the probate court refusing to probate the will of Abigail Starr. An issue was made up on the question of her sanity and the appellant offered the executor as a witness on the issue. The trial court refused to admit him. He was not an attesting witness. And it was urged by appellant that as executor he had no interest in supporting the will, "being a mere trustee and having no devise or legacy given him therein."

The Supreme Court refused to accept this view and sustained the lower court upon the authority of the following:

1 Phillips on Ev., Secs. 69, 70 (7th Ed.);
Roscoe on Ev., (2nd Ed.) 85;
Nason *v.* Thacher, 7 Mass. 398.

SECOND:

If the testament is not absolutely void at the common law and under the declaratory statute requiring wills to be attested by at least two competent witnesses, then certainly so much of it as creates A. executor and trustee would be void under the provisions of Sec. 2529 of the Code of 1887, supra.

(Note. This article might be ended here, as Sec. 2529 of

Code 1887, has been repealed, but, as already intimated, cases may arise in which the need for it may be very urgent.)

We are dealing in this case not with a bare executor whose powers and duties are prescribed by law and may be supervised by a controlling court of equity. We have here combined an executor and trustee with unlimited powers specifically granted by the creative instrument. It is recorded in the instrument itself, that the executor and trustee is a *devisee and legatee* therein and within the very terms of the prohibitive statute upon which the rejected instruction is based. The testament reads: "I give, devise and bequeath unto my executor and trustee." This is in terms, a devise for years to the executor in trust, with remainder over. The limitation of the devise in trust for a term, cannot alter the legal effectuation which the language quoted plainly expresses. Otherwise, a devise limited for life or for a term, would stand upon a different juristic foundation from a devise in fee, in contemplation of this protective statute. The very statement of such an anomaly refutes it. It is quality, not quantity, of interest which is sought to be reached. As Judge Wilde said in Hawes *v.* Humpreys, 9 Pick. 350, 358, *supra,* "such an interest, however minute, will disqualify a witness." And the disqualifying language of the statute embraces "any beneficial interest" in "any estate"—that is for life, for a term, in trust, or otherwise. In this case, therefore, the executor and trustee carrying these extraordinary plenary powers stands upon a higher plane of interest, pecuniarily and juristically, than one clothed in bare executorial garb. He has the legal title and may convey the estate by his sole deed.

Nevertheless, it is submitted that even considered as a bare executor, without more, the policy and reason of the statute excludes him from reaping the fruits of such a bargain, and under the admitted facts makes null and void that clause of the testament, at the very least, which creates him executor and trustee.

This precise question was before the Illinois Supreme Court as recently as December (1915). Scott *v.* Couch, 111 N. E. 272 (rehearing denied February 3, 1916). The former decisions are adhered to in an opinion of such cogent reasoning, it is quoted at some length for convenience. The facts were that an

attesting witness was a stockholder in a Trust and Savings Bank and the institution itself was named as executor. It was held that the Bank, by reason of the commission allowed it by law, took a "beneficial interest" under the will, and that as its stockholders participated in such profits, they were thereby rendered incompetent as attesting witnesses, except by avoiding and annulling the appointment of the Bank as executor. In other words, the stockholder was competent as an attesting witness, but the bank was incompetent to act as executor.

The opinion, in part, follows:

"(1-3) On January 4, 1913, Michael O'Connor executed an instrument as his last will and testament at the People's Trust & Savings Bank in Galesburg, where he had done considerable business, and he died on May 24, 1914. The attestation clause was in the usual form, containing all the statutory requirements, and it was signed by Nellie Stark and W. H. Pankey as witnesses. Nellie Stark was a stenographer and clerk in the bank, and she testified to the execution of the will and that in her opinion the testator was at that time of sound mind and memory. W. H. Pankey was the other subscribing witness, and testified to the execution of the will and that at the time he regarded the testator as of sound mind and memory; but his testimony was stricken out by the court, because he was a director and stockholder of the bank, which was appointed executor of the will. The statute of wills provides that a will must be attested in the presence of the testator or testatrix by two or more credible witnesses, and that means witnesses who at the time were competent, in law, to testify concerning the subject matter. Harp *v.* Parr, 168 Ill. 459, 48 N. E. 113; Johnson *v.* Johnson, 187 Ill. 86, 58 N. E. 237. *The test of competency is whether the witness will gain or lose financially as a direct result of the establishing of the instrument as a will.* O'Brien *v.* Bonfield, 312 Ill. 428, 72 N. E. 1090. Under that rule a person who is appointed executor by a will is incompetent to attest it as a witness because he will gain the commissions allowed by law if the will is established, and that is a direct financial gain to him, *and another person who by virtue of a contract is to share in the fees earned by the executor is equally incompetent.* Smith *v.* Goodell, 258 Ill. 145, 101 N. E. 255. The test whether a witness has an interest which disqualifies him, under the act concerning evidence and depositions, to tes-

tify against an heir, devisee, or legatee, is whether he will immediately gain or lose by the event of the suit, or whether the verdict can be given in evidence for or against him in another suit. The interest must be a legal interest in the outcome of the suit and it must be certain, direct, and immediate. Feitl *v.* Chicago City Railway Co., 211 Ill. 279, 71 N. E. 991; Jones *v.* Abbott, 235 Ill. 220, 85 N. E. 279; Ackman *v.* Potter, 239 Ill. 587, 88 N. E. 231.

* * *

"There is, however, a special statutory provision applicable to a witness attesting the execution of a will.

"(4) In the revision of 1872 (Laws 1871-72, p. 775) a provision of the Revised Statutes of 1845 was brought forward as Section 8 of the Statute of Wills (Hurd's Rev. St. 1913, c. 148). It removed the incompetency of a witness to the execution of a will to whom any beneficial devise, legacy, or interest was made or given by the will, and provided that such witness should be compellable to appear and give testimony on the residue of the will in like manner as if no such devise or bequest had been made, but the devise, legacy, or interest was declared to be null and void unless the will had been duly attested by a sufficient number of witnesses exclusive of such person, saving, however, to the witness any share of the testator's estate not exceeding the value of the devise or bequest to which the witness would have been entitled if the will was not established. That section of the statute of wills was regarded by this court as remedial, and its purpose and effect was explained, in Jones *v.* Grieser, 238 Ill. 183, 87 N. E. 295, 15 Ann. Cas. 787. * * * That decision was adhered to and indorsed in Fearn *v.* Postlethwaite, 240 Ill. 626, 88 N. E. 1057, where it was again said that, although one named as an executor is not a competent witness to the will, he may be compelled, if his testimony is needed, *to abandon his executorship and testify to the* execution of the will. That case, however, involved the question of the competency of the wife of the person named as executor, and it was held that her incompetency was not removed by Section 8, since nothing was given to her by the will, and, like the wife of a devisee or legatee, she was prohibited from testifying for or against the interest of her husband on grounds of public policy.

"After the decision in the Fearn Case the General Assembly, in 1911, amended Section 8 by broadening its terms so as

to include the wife or husband of any witness to whom any benefit was given by the will, and declaring that on account of the remedial character of the section it should be construed liberally.

* * *

"In this case the incompetency of Pankey arose from the fact that the will gave a beneficial interest to the corporation of which he was a director and a stockholder, and the beneficial interest to the stockholder was direct, immediate, and substantial. Every dollar and every piece of property that comes to a corporation comes directly to the stockholders and increases the value of their stock. In substance, the stockholders, collectively, represented by the artificial corporate entity, were executors of the will. The interest of Pankey was derived directly from the will, and not through any private contract or arrangement outside of it, and his incompetency arose directly from the beneficial interest given to him and the other stockholders as a corporation. The statute applied, and the court erred in striking out his testimony. *The bank being disqualified to act as executor,* and therefore having no interest, M. O. Williamson, who was rejected as a witness, was competent to testify generally in the case.

"The contestant introduced no evidence whatever on the subject of testamentary capacity, but was content to rest upon the proposition that W. H. Pankey was an incompetent witness and the opinion of the two nurses that the testator was not of sound mind and memory. The will and codicil were attested in the manner required by the statute, and the court erred in holding the contrary. The judgment is reversed, and the cause remanded."

The English Chancery is in accord with this doctrine. In the case of In re Pooley, 40 L. R., C. D., 1, the Court of Appeals held that a solicitor who was an attesting witness to a will who was also a trustee took a beneficial interest under a clause allowing him compensation for services. Mr. Justice Sir James Sterling, first heard the case in the court below and upon a ruling on the point adverse to Poole, the latter took the case into the Court of Appeals where it was decided in October 1888. In other words even if the common law had not been changed by the statute, Mr. Pooley was not competent to attest the will

because he took an "interest" for services under the clause in question.

It is to be observed that in England there is no statutory allowance to the executor for discharging his duties, but a rule of the Chancery gives the remuneration. In re Barber, 31 L. R., C. D., at 669 (1886). Our practice goes much further and gives "reasonable expenses" and "a reasonable commission." Code Sec. 2695, and Notes.

The case referred to by Mr. Justice Cooton, In re Barber, *supra,* was this: By will dated the 27th November, 1882, Mrs. Barber appointed Harmer a solicitor, and her daughter Mrs. Vinnecome, executor and executrix of her will, and gave them her estate in trust with power to sell and, after paying her debts, to divide the balance between her two daughters in equal shares. Harmer was an attesting witness to the will and under one of its clauses was empowered to charge for services to be rendered. Harmer obtained probate *and then employed his partner Ruddock to do the work necessary to executing the trust.*

The court held that this was a beneficial interest to the attesting witness, which accordingly, under Mr. Justice Lindley's opinion in the case of Pooley, *supra,* made him incompetent "under the old law." See Burgess *v.* Vinnecome, 31 ch. Div., 665, 34 ch. Div. 77, 40 ch. Div. 1. In Scotland, where the executor was one of the attesting witnesses, it was held that the testament was null as to his appointment, but good in other respects. Tait on Evid., 84.

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